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AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 525

Case No. 559: YOUGBARE

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Ahmed Osman, Vice-President; Mr. Luis de Posadas Montero;

Whereas, on 15 February 1990, Julien Yougbare, a former staff member of the United Nations Development Programme (UNDP), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 23 April 1990, the Applicant, after making the necessary corrections, again filed an application, containing the following pleas:

"Pleas

I request of the Tribunal:

1. The annulment of this abusive decision to dismiss me after 22 years of service without professional misconduct.

2. The computation of my retirement from 23 January 1989, the date upon which I reached 55 years of age.

3. Payment of damages for injury sustained from the date my permanent contract was broken until the present for the following:

(a) Numerous anxieties

(b) Unemployment

(c) Numerous nights without sleep

(d) Interruption of children's education because of non-payment of tuition

(e) Non-completion of residence

(f) Foregone medical care, etc."

Whereas the Respondent filed his answer on 14 November 1990;

Whereas the Applicant filed written observations on 29 January 1991;

Whereas, on 6, 16 and 22 May 1991, the Tribunal put questions to the Respondent and the Respondent provided answers thereto on 20, 21 and 24 May 1991;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNDP on 1 May 1966, as a locally recruited clerk at the UNDP office in Ouagadougou (Burkina Faso). Until 1 October 1977, he served on a succession of fixed-term appointments, and then was granted a probationary appointment. On 1 May 1978, he was granted a permanent appointment.

During the course of his employment with UNDP, the Applicant was promoted progressively from level 4-III to level 7. He was promoted from level 4 to level 5 as Senior Clerk, with effect from 1 November 1968; from level 5 to level 6 as Administrative Assistant, with effect from 1 January 1974; to level 6-VII as Assistant in Information and Public Relations, with effect from 1 January 1980; to level 6-X as Programme Assistant, with effect from 1 May 1983; and to level 7 as Senior Programme Assistant, effective 1 January 1986, a function he exercised at the time of the events that gave rise to the present proceedings.

On 26 October 1987, the Assistant Resident Representative informed the Resident Representative that after conducting a local inquiry concerning the purchase of a new battery for the car that had been put at the disposal of the United Nations High Commissioner for Refugees (UNHCR), as well as concerning the excessive consumption of petrol by that car, he had concluded that the Applicant should be charged with the misuse of an official UNHCR car for private purposes, conversion of official petrol coupons for his private use and misappropriation of a UNDP car battery for his own private use. The

Applicant was informed of the charges against him at a meeting held on 28 October 1987. According to the minutes of the meeting, the Applicant explained that since he assisted in refugee matters, he had for a long time used his private car for official purposes. Since the purchase of the car for UNHCR, he had used it on occasion for private purposes. In a letter dated 5 November 1987, the Applicant set forth his own account of the facts, along with explanations and justifications.

On 25 November 1987, the Resident Representative informed the Applicant that an ad hoc Committee would be established to examine the allegations and the Applicant's written comments thereon. Pending completion of the Committee's work, the Applicant was suspended with full pay. In a report dated 22 January 1988, the ad hoc Committee concluded that, as regards the battery, there was nothing to be examined since the Applicant himself had acknowledged that he had taken the battery for his own use but had purchased another new battery to replace the one in the official car three weeks later. As regards the consumption of petrol, the Committee did not accept the Applicant's explanations, and as regards the use of the official car, the Committee concluded that the Applicant had used the car to go to the office and to return home. It found that the official car had been used for four private trips and that explanations furnished by the Applicant could not be confirmed. It noted, however, that on at least one of the trips, the Applicant had been accompanied by a staff member of UNHCR and that the car had been put at the disposal of members of UNHCR missions after office hours.

On 1 February 1988, the Resident Representative decided to withhold the Applicant's within-grade salary increment. On 14 March 1988, he informed the Applicant that the results of the investigation had been transmitted to Headquarters for a final decision concerning the appropriate disciplinary measures to be taken against him. In the meantime, the Applicant would be transferred to the administrative section of the local UNDP office.

In a letter dated 14 March 1988, the Resident Representative informed the Director, Division of Personnel, that he did not wish to recommend the Applicant's dismissal, but that he favoured more lenient measures, including withholding of the annual step increment, payment to UNHCR of the total estimated costs resulting from the misconduct, transfer to the administrative section of the UNDP office to work under the direct supervision of the Assistant Resident Representative, and a written censure by the Administrator.

Also, the Resident Representative informed the Applicant of the decision to reintegrate him into the office pending a final decision on the disciplinary measures by Headquarters, New York.

On 27 June 1988, the Chairman of the UNDP/UNFPA (United Nations Population Fund) Disciplinary Committee informed the Administrator that:

> "... in addition to the formal charge of misuse of official properties this senior local staff member had also appropriated a new car battery for his own use. Once this had been discovered, he repaid the Organization for its cost. ... [T]his additional incident did ... point to a general lack of ethics on the part of the staff member. The Committee noted the reasons provided by the staff member for using the office vehicle and petrol coupons for his own benefit - that he had for many years used his personal vehicle and petrol for official purposes and had not been reimbursed; - the Committee could not accept this as a justification in view of the modalities clearly laid out by the regulations for reimbursements in such cases. ... [T]he disciplinary action proposed by the then ResRep ... the Committee felt was far too lenient and, furthermore not consistent with the recommendations made by the Committee in other similar cases of alleged misconduct."

The Committee recommended dismissal, with termination indemnities to be decided at the discretion of the Administrator.

In a cable dated 25 August 1988, a Senior Policy Officer, UNDP, informed the Resident Representative that, upon the recommendation of the UNDP/UNFPA Disciplinary Committee, the Administrator had decided to dismiss the Applicant for misconduct, in accordance with staff rule 110.3(b) and that, pursuant to his discretionary authority, under paragraph (c) of annex III to the Staff Regulations, the Administrator had decided not to pay the Applicant a termination indemnity. Accordingly, the Applicant was informed of this decision on 30 August 1988 and was separated from the service of UNDP on 31 August 1988.

On 9 September 1988, the Applicant requested the Secretary-General to review the administrative decision to dismiss him. On 21 November 1988, the Applicant was informed that the Secretary-General had decided to maintain his decision. On 7 December 1988, the Applicant lodged an appeal with the Joint Appeals Board. The Board adopted its report on 29 August 1989. Its conclusions and recommendations read as follows:

"Conclusions and Recommendation

48. The Panel unanimously

Finds that the appellant's misconduct has been properly established;

Finds that the procedure leading to the decision to dismiss the appellant for misconduct was not tainted by prejudice, lack of due process or any other extraneous factor;

Finds that the principle of equal treatment has been applied in strict observance of the staff regulations and rules and of the jurisprudence of the United Nations and ILO Administrative Tribunals;

Finds that the Administrator acted in accordance with the jurisprudence of the United Nations Administrative Tribunal which has consistently ruled that the Secretary-General had wide discretion and authority in taking disciplinary action;

Finds that the punishment may have been too harsh.

49. The Panel unanimously recommends that a termination indemnity corresponding to six months of pensionable remuneration (calculated as indicated in paragraph (a) of annex III to the Staff Rules) be paid to the appellant in accordance with paragraph (c) of that annex.

50. The Panel makes no further recommendation in support of the appeal".

On 10 January 1990, the Officer-in-Charge, Department of Administration and Management, transmitted to the Applicant a copy of the Board's report and informed him that:

"The Secretary-General, having re-examined your case in the light of the Board's report, has decided to maintain the contested decision of the Administrator of UNDP. The Secretary-General has further decided to grant you an indemnity equivalent to six months of pensionable remuneration in accordance with paragraphs (a) and (c) of annex III of the Staff Regulations in final settlement of your case."

On 23 April 1990, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent's decision to dismiss the Applicant is excessive and not justified under the circumstances and should be annulled.

2. The Applicant's separation from service should be effective on 23 January 1989, the date upon which he reached 55 years of age, and not on 31 August 1988.

3. The Respondent should pay damages for various injuries suffered since the revocation of the Applicant's permanent contract.

Whereas the Respondent's principal contention is:

The contested decision was taken by the Respondent in the exercise of his discretionary powers in disciplinary matters conferred by article 10.2 of the Staff Regulations and staff rule 110.3(b).

The Tribunal, having deliberated from 7 May to 31 May 1991, now pronounces the following judgement:

I. In his first plea, the Applicant contests the Respondent's decision to maintain his dismissal for misconduct, as decided by the UNDP Administrator in accordance with article 10.2 of the United Nations Staff Regulations and staff rule 110.3(b), and to grant him only a termination indemnity corresponding to six months of pensionable remuneration, in accordance with paragraphs (a) and (c) of annex III to the Staff Rules.

II. According to the UNDP/UNFPA Disciplinary Committee, the charges against the Applicant are:

(a) The appropriation of a battery from the official car of the UNHCR office, although the Disciplinary Committee recognizes that this fact is not directly related to the matter at issue, and despite the fact that the ad hoc investigative committee initially established to give an opinion on the accusations against the Applicant considered the matter of the battery as closed because the Applicant had acknowledged the facts and had even replaced the battery;

(b) The use of an official car and petrol coupons of the UNHCR office for private purposes.

III. In considering a request for the annulment of a disciplinary decision, the Tribunal recalls its consistent position in its case law on such matters. According to that case law, the Secretary-General has wide discretionary power in the exercise of his disciplinary authority, both in the determination of what constitutes misconduct and in the imposition of appropriate disciplinary measures.

Nevertheless, the Tribunal recognizes its competence to review the Respondent's decision if that decision is based on an erroneous assessment of the facts or if it is arbitrary or motivated by prejudice or other extraneous considerations.

The Tribunal will consider whether the case at issue falls into the category of exceptional cases justifying a review of the Respondent's decision.

IV. Upon consideration of the facts and circumstances of the case, the Tribunal notes that a number of facts have been established:

(a) Firstly, the existence of the facts mentioned in the charges against the Applicant was properly established after an appropriate fact-finding procedure conducted according to the norms in force. These facts were confirmed by the ad hoc investigative committee, by the Disciplinary Committee and by the Joint Appeals Board;

(b) The Tribunal also notes that the Applicant was afforded the guarantees of proper procedure, under which he was informed of the charges against him and had the opportunity to defend himself and to present his point of view;

(c) The charges against the Applicant constitute misconduct entailing disciplinary action. Furthermore, the Applicant does not contest the existence of misconduct, nor the fact that such misconduct deserves disciplinary action, but only the severity of such action, which he finds disproportionate to his misconduct.

V. The Tribunal notes that the essential dispute between the two parties lies in the choice of the appropriate disciplinary measure. While the Respondent, in the final phase of the disciplinary process, opted for an extreme measure, i.e. dismissal for misconduct, the Applicant feels that this measure is excessive in relation to the charges against him, which he qualifies

as minor transgressions. The Applicant considers that he should incur a less severe penalty, namely "a written censure without promotion, perhaps followed by a transfer, instead of a blind and selective dismissal".

In support of his contention that the penalty is excessively severe, the Applicant mentions a whole series of considerations which may constitute extenuating circumstances.

VI. Thus, he attempts to justify the use of the official car and the petrol coupons of the UNHCR office for his own car by the following explanations:

(a) Since the opening of the UNHCR office in 1981, for which he was responsible, the Applicant has not spared his personal resources for its smooth operation, working alone without a secretariat, social worker or vehicle until 1986. During that time, he had to use his own car to settle the many refugee problems at the university, at police stations, at health facilities, at their homes, at the headquarters of CDC offices, etc.

The Respondent did not accept this as justification, since there are established rules for obtaining reimbursement in such cases.

While considering that the relevant rules in force must be scrupulously observed, the Tribunal finds that in this case, the Organization profited from the expenses incurred personally by the staff member. The Applicant assessed the costs he had assumed personally by the use of his own car in the service of the UNHCR office before the arrival of the official car at an overall sum, uncontested by the Administration, which far exceeds the sums claimed from him by the Respondent for the cost of fuel and mileage resulting from the use of the official car in violation of the rules in force.

(b) With respect to his use of the official car to return home and to come back to his office in the morning, the Applicant explains this in terms of safety considerations, which became a daily preoccupation after his public arrest in 1985 - a serious incident, caused by an ill-intentioned refugee, - during which the Applicant almost lost his life.

In this regard, the Tribunal notes that in his letter of 3 October 1988, addressed to the UNDP Administrator, the Chairman of the Staff Association in Ouagadougou referred to the very real threats to the life of the Applicant which his work entailed.

(c) With respect to the use of UNHCR petrol coupons for his own car, the Tribunal notes that the ad hoc investigative committee confirmed this fact in its report. The Applicant, however, declares that this took place only when the official car was in the garage to be checked or repaired, and contests the veracity of the testimony of the driver and the secretary on this subject.

VII. The Applicant also invokes as an extenuating circumstance his 22 years of honourable service as a dedicated and loyal staff member with no professional misconduct.

VIII. The Tribunal notes that the Resident Representative, Mr. Guarda, in a letter dated 14 March 1988 and addressed to Mr. Youkel, Director, Division of Personnel, Bureau for Finance and Administration, stated that he did not wish to recommend the dismissal of the Applicant and added that he was in favour of more lenient measures, namely a written censure by the Administrator and the withholding of the annual step increment. The Resident Representative had gone so far as to reintegrate the Applicant on a provisional basis in the UNDP administrative section pending the final decision on the disciplinary measures to be taken.

IX. At the local level, the Tribunal notes that the severity of the action of dismissing the Applicant caused some disturbance. Thus, in October and November 1988, three officials addressed letters to UNDP Headquarters in New York, emphasizing that the penalty imposed was disproportionate to the misconduct and was not justified by the circumstances.

These letters came from the Chairman of the Staff Association in Ouagadougou, from the new Resident Representative, Mr. Metcalf, and from the Executive Coordinator of the United Nations Volunteers programme.

X. The Tribunal observes that the Joint Appeals Board, while ruling in favour of the validity of the Respondent's decision, was nevertheless sensitive to particular circumstances of the case, which call for the exercise of leniency towards the Applicant.

In its conclusions, the Joint Appeals Board expressed this feeling on two occasions: (1) in finding unanimously that the punishment may have been too harsh, and (2) in recommending unanimously that the Secretary-General should grant a termination indemnity corresponding to six months of pensionable remuneration.

XI. Although the Secretary-General accepted the recommendation of the Joint Appeals Board to grant the Applicant the six months' indemnity, he maintained the decision to dismiss him, disregarding the Board's conclusion that the punishment imposed was too harsh and thereby ruling out the more lenient measures proposed by the Resident Representative, who had stated his position against the dismissal of the Applicant.

XII. It is true that, pursuant to the Tribunal's judgement in case No. 210, Reid (1976), paragraph IV, the reports of the Joint Appeals Board are of an advisory nature, and that the Respondent had the authority to arrive at different conclusions based on a consideration of all the facts and circumstances of the case. However, as the Tribunal notes in paragraph III supra, the Secretary-General's discretionary power to determine disciplinary measures, among other things, is not absolute.

XIII. In the present case, the Tribunal observes that, out of concern for consistency among the sanctions imposed in similar cases, the Respondent has made an erroneous assessment of the facts, arbitrarily discounting the extenuating circumstances and thereby applying an unduly severe penalty.

Although this concern for consistency in the imposition of penalties may be desirable for reasons of general fairness, it should not be implemented at the cost of not giving due consideration to essential facts and circumstances in a given case.

XIV. The Tribunal concludes that the grounds invoked by the Respondent to justify a more severe penalty, without taking into account essential and relevant facts of the case, are inappropriate grounds which have contributed to causing injury to the Applicant in the form of a premature separation, thereby entailing the responsibility of the Respondent and calling for compensation as hereinafter determined by the Tribunal.

XV. The Tribunal considers that the compensation due to the Applicant must take into account both the loss of emoluments and especially of pension benefits due to his premature termination, after a long period of service and just before he reached the age at which he could receive an early retirement benefit. Therefore the Tribunal decides that the amount of $25,000 constitutes appropriate compensation, and although this amount slightly exceeds the two years of net base salary specified in article 9.1 of its Statute it considers that the exceptional losses suffered by the Applicant justify the indicated amount.

XVI. The Tribunal decides that the Respondent shall pay the Applicant the sum of $25,000 in addition to the indemnities already paid. All other pleas are rejected.

(Signatures)

Roger PINTO
President

Ahmed OSMAN
Vice-President

Luis de POSADAS MONTERO
Member

Geneva, 31 May 1991

Paul C. SZASZ
Acting Executive Secretary